No. SC83617

IN THE SUPREME COURT
STATE OF MISSOURI

STATE OF MISSOURI ex rel.
DEAN WILLIAMS

Relator,

v.

THE HONORABLE TIMOTHY J. WILSON,

Respondent.

On Petition for Writ of Prohibition
From the Circuit Court of the City of St. Louis, Missouri
Twenty-second Judicial Circuit, Division 19
The Honorable Timothy J. Wilson, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This action is brought by Relator for a writ of prohibition, pursuant to Article V, Section 4 of the Missouri Constitution, Section 530.020, RSMo 2000, and Missouri Supreme Court Rule 97. Relator alleges that respondent lacks jurisdiction to hold Relator for trial on criminal charges.

STATEMENT OF FACTS

Relator, Dean Williams, is the defendant in Cause No. 991-3872, in the Circuit Court of St. Louis City, State of Missouri, 22nd Judicial Circuit. Respondent, the Honorable Timothy J. Wilson, is the Circuit Judge of the Criminal Trial Division 19 of the 22nd Judicial Circuit.

On November 18, 1999, Relator was charged by Indictment with Count I, Trafficking Drugs in the Second Degree, a class B felony, and Count II, Possession of a Controlled Substance, a class C felony, as a Prior and Persistent Drug Offender, punishable under Sections 195.275 and 195.295.2, RSMo. Relator's Appendix of Exhibits, hereinafter "RAE", A1-A3.[1]

[1] The Missouri Legislature defines "Persistent drug offender" as "one who has previously pleaded guilty to or has been found guilty of two or more felony offenses of the laws of this state or of the United States, or any other state, territory or district relating to controlled substances." Section 195.275.1(2), RSMo. Where an individual is found guilty of or pleads guilty to a violation of Section 195.223.3(1), Trafficking Drugs 2nd Degree, Cocaine Base, a class B felony, and is also found to be a persistent drug offender, the defendant is subject to the range of punishment applicable to a class A felony; ten to thirty years in the custody of the Missouri Department

On February 1, 2001, the State of Missouri, by undersigned counsel, filed its proposal letter to the Relator, proposing a plea agreement under which the Relator would be sentenced to ten years without the possibility of probation or parole in exchange for a plea of guilty as charged. Respondent's Appendix of Exhibits, A1. On February 26, 2001, Relator's defense attorney, Mr. Dane Roper, approached undersigned counsel and informed the State that Relator was currently enrolled in a long-term drug treatment program pursuant to Section 217.362, RSMo, as a result of a previous criminal conviction in the 22nd Judicial Circuit.[2] Mr. Roper asked

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of Corrections. Section 195.295.2, RSMo. Further, the sentence imposed "shall be without probation or parole." Id. (emphasis added).

[2] Section 217.362, RSMo, allows a defendant convicted of a drug offense to be sentenced to a long-term drug treatment program in the custody of the Missouri Department of Corrections, upon the completion of which the sentencing judge regains jurisdiction to grant the defendant probation on his or her sentence. The sentence enhancement authorized under Section 195.295.2, RSMo, is inconsistent with the ultimate effect of Section 217.362, RSMo, because a persistent drug offender cannot be granted probation or parole from conviction of a violation of Section 195.223.3(1), RSMo.

if undersigned counsel would reconsider his recommendation to the Circuit Court and asked that undersigned counsel waive the sentence enhancement of persistent drug offender alleged in the Indictment.

On February 27, 2001, undersigned counsel conveyed a second offer to Mr. Roper as follows: the State would waive the persistent drug offender enhancement on the condition that Relator and the sentencing judge would agree to a conventional ten-year sentence not pursuant to Section 217.362, RSMo. Respondent's Appendix of Exhibits at A1. On March 5, 2001, this cause was assigned for trial to Judge Evelyn Baker, Division 6 of the 22nd Judicial Circuit. Mr. Roper and undersigned counsel met with Judge Baker in chambers to discuss the disposition of the case. RAE at A23. Mr. Roper explained the charges against Relator and informed Judge Baker that Relator was currently in a long-term drug treatment program pursuant to Section 217.362, RSMo. RAE at A23. Undersigned counsel informed Judge Baker that the State would waive sentence enhancement only on the contingency that Relator would be sentenced to a conventional ten-year sentence, without probation, and not pursuant to Section 217.362, RSMo. RAE at A28. Judge Baker and Mr. Roper agreed to abide by this agreement. See RAE at A28 (wherein Judge Baker is confronted with the agreement and instead of denying that the agreement existed states: "You cannot make that decision

for this Court."); RAE at A18-A19 (wherein Mr. Roper concedes that he understands the State is waiving sentence enhancement in exchange for a specific sentence concession from the court, and then takes it upon himself to instruct the court that although "[he was] not going to argue for probation" . . . "[he] also recognize[d] that [he did not] have the power to plea bargain away the Court's ability to do whatever option it sees fit. And so [he would], on behalf of Mr. Williams, lay this matter on the conscience of the Court or the mercy of the Court.")

On March 6, 2001, the parties convened before Judge Baker for the guilty plea. Relator testified that he had several prior convictions. RAE at A8. The Court stated "I didn't read them into the record. It's my understanding he was not going to be - - but I always ask if they've got priors. He's got several." RAE at A5-A6. At the plea hearing, undersigned counsel stated the State's recommendation on the record, explaining that the State was waiving sentence enhancement on the condition that Relator would be sentenced to ten years on Count I and seven years on Count II, to run concurrent to Count I, and not pursuant to Section 217, RSMo. RAE at A11. Undersigned counsel made a record of what the evidence would have shown had the case gone to trial, and Relator affirmed the factual

allegations. RAE at A13-A15. Judge Baker accepted Relator's guilty plea. RAE at A16-A17.

In the sentencing phase of the hearing, Relator and Mr. Roper breached the plea agreement by implicitly requesting sentencing pursuant to Section 217.362, RSMo, RAE at A17-A18, and by stating that Relator would "lay this matter on the conscience of the Court or the mercy of the Court." RAE at A19. Judge Baker rejected the plea agreement without notice to the State and sentenced defendant pursuant to the provisions of the long-term drug treatment program and ran the sentence concurrent to the sentence defendant was currently serving pursuant to Section 217.362, RSMo. RAE at A21, A28. Undersigned counsel immediately moved Judge Baker to set aside the plea on the grounds that the State had only waived sentence enhancement in reliance on the plea agreement and Judge Baker's assurance that defendant would not be sentenced pursuant to Section 217.362, RSMo. RAE at A21-A22. Judge Baker recognized that the State had waived sentence enhancement, and undersigned counsel argued that the defense and the court had violated the plea agreement. RAE at A28. Judge Baker stated that she was not obligated to abide by the plea agreement, regardless of the State's reliance on her sentencing concessions. RAE at A28.

Judge Baker initially offered to allow the State to prove up the charged sentence enhancement, but refused to set the plea aside. RAE at A23-A24. Undersigned counsel again informed the Judge that sentencing pursuant to Section 217.362, RSMo, and the alleged sentence enhancement were inconsistent. RAE at A25-A27. Judge Baker then refused to allow the State to prove the charged sentence enhancement, stating her concern that Relator would be ineligible for the long-term drug treatment program as a result of the charged sentence enhancement. RAE at A27-A28.

Immediately after the plea hearing, Judge Baker ordered the State to sign the Sentence and Judgment Form for the record, and undersigned counsel refused to do so. See RAE at A32. On March 8, 2001, Judge Baker entered an order setting aside the sentence and judgment and sending the case back to Division 16 for further proceedings. RAE at A33. Relator's criminal case was previously set for trial in the 22nd Judicial Circuit, before the Honorable Timothy J. Wilson, on May 21, 2001, at 9:30 a.m. Relator filed his petition for writ of prohibition in this Court while his underlying criminal case was pending trial before Judge Wilson. On May 21, 2001, Relator's criminal case was again transferred to Division 16, 22nd Judicial Circuit, for further proceedings before the Honorable Michael P. David,

Chief Judge. Relator's case is currently pending trial subject to this Court's Order to take no further action until further order.

POINTS RELIED ON

I.

JUDGE BAKER MAINTAINED JURISDICTION TO SET ASIDE HER SENTENCE AND JUDGMENT BECAUSE HER SENTENCE VIOLATED MISSOURI LAW, AND WAS THUS VOID, IN THAT JUDGE BAKER VIOLATED RULE 24.02(D)(4) BY FAILING TO ANNOUNCE ON THE RECORD THAT THE COURT WOULD REJECT THE PLEA AGREEMENT. ADDITIONALLY, JUDGE BAKER HAD JURISDICTION TO SET ASIDE HER SENTENCE AND JUDGMENT PURSUANT TO RULE 29.07(D) BECAUSE THE SENTENCE WAS A MANIFEST INJUSTICE IN THAT THE STATE RELIED UPON THE PLEA AGREEMENT IN WAIVING SENTENCE ENHANCEMENT.

State v. Morris, 719 S.W.2d 761 (Mo.banc 1986)

Schellert v. State, 569 S.W.2d 735 (Mo.banc 1978)

Ossana v. State, 699 S.W.2d 72 (Mo.App., E.D. 1985)

Robinson v. Sussman, 253 S.W. 186 (Mo.App., SLD 1923)

Section 195.223.3(1), RSMo 2000

Section 217.362, RSMo 2000

Rule 24.02(d)(4)

II.

ALLOWING THE 22ND JUDICIAL CIRCUIT TO TRY RELATOR FOR HIS CRIMES WOULD NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE BECAUSE THERE IS NO FINAL JUDGMENT ON THE CHARGES FOR THE REASONS ARGUED IN RESPONDENT'S RESPONSE TO POINT I.

Wright v. State, 764 S.W.2d 96 (Mo.App., W.D. 1988)

Ossana v. State, 699 S.W.2d 72 (Mo.App., E.D. 1985)

ARGUMENT

I.

JUDGE BAKER MAINTAINED JURISDICTION TO SET ASIDE HER SENTENCE AND JUDGMENT BECAUSE HER SENTENCE VIOLATED MISSOURI LAW, AND WAS THUS VOID, IN THAT JUDGE BAKER VIOLATED RULE 24.02(D)(4) BY FAILING TO ANNOUNCE ON THE RECORD THAT THE COURT WOULD REJECT THE PLEA AGREEMENT. ADDITIONALLY, JUDGE BAKER HAD JURISDICTION TO SET ASIDE HER SENTENCE AND JUDGMENT PURSUANT TO RULE 29.07(D) BECAUSE THE SENTENCE WAS A MANIFEST INJUSTICE IN THAT THE STATE RELIED UPON THE PLEA AGREEMENT IN WAIVING SENTENCE ENHANCEMENT.

Relator argues that Judge Baker's order setting aside the judgment and sentence is invalid because once she entered her sentence in the record, the 22nd Judicial Circuit lost jurisdiction to set the judgment and sentence aside and hold the Relator for trial. Relator wants to retain the benefit of a plea bargain that was not honored by the circuit court.

A circuit court exhausts its jurisdiction over a criminal defendant upon entry of a sentence that is consistent with the law. State v. VanSickel, 726

S.W.2d 392 (Mo.App., W.D. 1987)(citing State ex rel. Wagner v. Ruddy, 582 S.W.2d 692, 695 (Mo. 1979)). A trial court maintains jurisdiction to set aside judgment and sentence if the initial sentence is contrary to law. State v. Morris, 719 S.W.2d 761, 763 (Mo.banc 1986)(citing Ossana v. State, 699 S.W.2d 72, 73 (Mo.App., E.D. 1985)).

Judge Baker's sentence violated Missouri Supreme Court Rule 24.02(d), which governs plea agreements. The State is entitled to enter into an agreement with the defense to dismiss charges or to make a recommendation to the Court in exchange for the defendant's plea of guilty to a charged offense. Rule 24.02(d)(1)(A)(B). The court is not allowed to participate in any plea negotiations, but after an agreement has been reached the court is allowed to discuss the agreement with the parties, including any alternative that is acceptable to both parties. Rule 24.02(d)(1). The parties are allowed to include in the plea agreement sentencing concessions that must be made by the court. Schellert v. State, 569 S.W.2d 735, 739 (Mo.banc 1978). If the State and defense have reached a plea agreement, the court is required to make a record requiring disclosure of the agreement in open court. Rule 24.02(d)(2). If the court accepts the plea agreement, the court must inform the defendant that it will sentence in accordance with the plea agreement. Rule 24.02(d)(3). **If the court rejects the plea agreement,**

the court shall, on the record, inform the parties that it will not follow the plea agreement. Rule 24.02(d)(4).

Judge Baker agreed to sentence the Relator in accordance with the plea agreement off the record. See RAE at A28 (wherein, immediately after sentence had been pronounced, the State confronted Judge Baker with her prior agreement to sentence the defendant in accord with the plea agreement and Judge Baker merely stated: "You cannot make that decision for this Court."). The State detailed the parameters of the plea agreement on the record at the plea hearing; the State was waiving sentence enhancement on the condition that defendant would not be sentenced pursuant to Section 217, RSMo. RAE at A11. The State waived sentence enhancement on this condition and Judge Baker did not inform the State that she was rejecting the plea bargain. If Judge Baker had not violated Rule 24.02(d)(4), the State would have proven up the charged sentence enhancement and Judge Baker would not have had the authority to grant the Relator probation pursuant to Section 217.362, RSMo. Section 195.295.2, RSMo. Judge Baker's violation of Rule 24.02(d)(4) renders the original sentence in this case contrary to Missouri law and thus void.

The thrust of Relator's argument is that although Judge Baker violated Rule 24.02(d)(4), Judge Baker did not maintain jurisdiction to correct her

error. Relator's brief at 21-22. Relator cites State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo.banc 1993) and State ex rel. Wagner v. Ruddy, 582 S.W.2d 692 (Mo.banc 1979) for the rule of law that a trial court's jurisdiction ends after sentencing, absent an express grant of jurisdiction by rule or statute. Relator's Brief at 16, 19, 21, 22, 23, 33, 35. Relator further argues that there is no statute or rule granting a trial court jurisdiction to set aside judgment and sentence without a motion by the defendant. Relator's Brief at 23-24, 33-34.

Relator's reliance on State ex rel. Simmons v. White and State ex rel. Wagner v. Ruddy is misplaced. It is true that these cases stand for the proposition that once a sentence has been imposed the circuit court must function under a specific grant of jurisdiction by rule or statute in order to set aside a sentence and judgment. This is, however, only applicable to situations *where the circuit court's initial sentence complies with the law.* See State v. Morris, 719 S.W.2d 761, 763 (Mo.banc 1986); Ossana v. State, 699 S.W.2d 72, 73 (Mo.App., E.D. 1985).

In State ex rel. Simmons v. White, a criminal defendant pled guilty to two counts of driving while intoxicated as a persistent offender, and the circuit court sentenced the defendant pursuant to the charged sentence enhancement provision. 866 S.W.2d 443, 444 (Mo.banc 1993). Six days

after sentencing, the prosecutor filed an amended information, alleging additional prior convictions for driving while intoxicated, upon realizing that the evidence proffered at the first plea proceeding was insufficient to support a finding that the defendant was a persistent offender. Id. at 444. The circuit court set aside its original judgment and sentence, and the defendant pleaded guilty at a second plea proceeding and was sentenced a second time. Id. at 444-45. On habeas review, the defendant sought to have the original judgment and sentence reinstated, arguing that because the circuit court had sentenced him prior to the filing of the amended information, the circuit court lost jurisdiction to convict and sentence him. Id. at 445. This Court held that the trial court's order setting aside sentence was void and that the initial sentence should stand. Id. at 445.

In State ex rel. Wagner v. Ruddy, 582 S.W.2d 692 (Mo.banc 1979), the circuit court set aside a sentence, scheduled a resentencing, and ordered a supplementary presentence investigation report. Id. at 692. This Court held that the circuit court did not maintain jurisdiction to sentence the defendant after the initial sentence was imposed. Id. at 695.

The factor that differentiates State ex rel. Simmons v. White and State ex rel. Wagner v. Ruddy from the case at bar is that these cases involve the circuit court initially entering a sentence that was in concurrence with the

law. No statute or rule was alleged to have been violated by the circuit court or by any party in the plea or sentencing proceeding. In the case at bar, the original sentence violated Rule 24.02(d)(4); thus, the original sentence was void.

The law is clear that where a sentence violates the law, that sentence is considered void. Ossana v. State, 699 S.W.2d 72, 73. Relator concedes in his brief that "[a] sentencing court that enters a legally void sentence has not rendered a final judgment, retains jurisdiction over the case, and may resentence the defendant without a special provision of the law." Relator's Brief at 18. This is because the original sentence is considered a nullity and is void, *not voidable via some other cause of action*.

Relator attempts to circumvent this rule of law by arguing that Judge Baker's sentence was not illegal "per se" because the sentence did not exceed the range of punishment authorized by the legislature. Relator's Brief at 17. What Relator fails to recognize is that Supreme Court Rules have the same force and effect as statutes. Robinson v. Sussman, 253 S.W. 186 (Mo.App., SLD, 1923). Whether a circuit court violates a statute by sentencing a criminal defendant to a term of years beyond the range authorized by the legislature for a specific offense, or by running sentences consecutively, see Ossana v. State, 699 S.W.2d 72, 73 (Mo.App., E.D.

1985), or by sentencing a defendant outside the parameters of a plea agreement without previously informing the parties of its intentions, see Schellert v. State, 569 S.W.2d 735, 736 (Mo.banc 1978); State v. Simpson, 836 S.W.2d 75, 76-7 (Mo.App., S.D. 1992), the sentences are equally in violation of the law.

The Respondent does not contend that every error of law would render a sentence void, however, where a plea agreement has been reached by the parties that includes a sentencing concession by the court, the sentence rendered must be in compliance with the agreement, absent a statement by the court notifying the parties that the agreement will not be honored. If the State is waiving sentence enhancement or dismissing charges based on the plea agreement, any sentence that is imposed contrary to the sentencing concession conceived by the agreement would be a sentence less than that required by law. Without the State's waiver of enhancement or dismissal of charges, the minimum sentence the circuit court could impose under the law would be greater—in this case, ten years without the possibility of probation or parole. Section 195.295.2, RSMo.

In Ossana, the Eastern District held that the circuit court maintained jurisdiction to set aside its original sentence because it violated Section 558.026.1, RSMo, which required the sentences to run consecutively. 699

S.W.2d at 73. Just as Rule 24.02(d)(4) does not expressly grant a circuit court jurisdiction to set aside a sentence that is imposed in violation of its provisions, Section 558.026.1, RSMo, does not provide for a remedial action to be taken by a circuit court. If the rules of this Court are to have the same force and effect as legislative enactments, Judge Baker's original sentence must be deemed void.

Relator contends that the State's only complaint is that it was not allowed to prove the sentence enhancement that was alleged in the indictment, and that this claim should have been litigated by the State on appeal pursuant to Section 547.200.2, RSMo. Relator's Brief at 20, 22.[3] The possibility that the State could seek resentencing on appeal has no bearing on the issue of the circuit court's jurisdiction to correct its violation of the law.

[3] It should be noted that the Relator did not file this petition in prohibition until well after the ten-day period within which the State may take an appeal from sentencing pursuant to Section 547.200.2, RSMo. Apparently, it is the Relator's contention that the State should have automatically assumed that the sentence which Judge Baker imposed was valid despite her order setting it aside three days after its entry into the record.

Relator points to Hattemar v. State, 654 S.W.2d 652 (Mo.App., E.D. 1983), where a defendant raised a violation of Rule 24.02(d) in a post-conviction motion pursuant to Rule 27.26. 654 S.W. 2d at 652; Relator's brief at 19. The claim in Hattemar was that the defendant was entitled to a statement by the circuit court that it would reject his plea agreement pursuant to Rule 24.02(d)(4). 654 S.W.2d at 652-53. Just because this claim was raised in a post-conviction motion does not mean that this is an exclusive remedy for a 24.02(d) violation. In fact, a motion for post-conviction relief is not the exclusive remedy for a party to litigate a violation of 24.02(d) by a sentencing court. See State v. Simpson, 836 S.W.2d 75 (Mo.App., S.D. 1992)(reviewing a defendant's claim of a 24.02(d)(4) violation on a motion to recall the mandate).

Relator further argues that Rule 24.02(d)(4) only grants the defendant an enforceable right to be informed of the court's rejection of the plea agreement. This is not what the rule says. The rule mandates that the court shall inform the "parties." When a party to the suit is relying upon the court's sentencing concession in waiving a right, whether that right be a right to a trial or the right to prove a sentence enhancement charged in the information, that party has the right to know the court's intentions. See Schellert v. State, 569 S.W.2d 735, 739 (Mo.banc 1978). The State is a

party to a criminal law suit to the same degree as the defendant. Under Rule 24.02(d)(4), the State has a right to know if the court is going to reject the plea agreement for the same reason a defendant does—to protect its position. A defendant would want to know because he might not want to enter a guilty plea and forgo trial if the court isn't going to abide by the sentencing concession bargained for by the defendant. In this case, the State would not have waived sentence enhancement if the court refused to grant the sentence concession required by the plea agreement.

Judge Baker was aware of the State's waiver of sentence enhancement and the conditions upon which that waiver was based. RAE at A11, A21-A28. Upon a breach of a plea bargain, the parties should be returned to the positions they occupied prior to the plea. State v. White, 838 S.W.2d 140, 142 (Mo.App. W.D., 1992)(citing Bolinger v. State, 703 S.W.2d 25, 28 (Mo. App., E.D. 1995)). The State should be free to proceed on the original charges in the indictment, and the defendant should be allowed the opportunity to contest the merits of those charges at trial. Id.; see Croney v. State, 860 S.W.2d 17, 19 (Mo.App., E.D. 1993); State v. Stokes, 671 S.W.2d 822, 824 (Mo.App., E.D. 1984). The Relator should not be allowed to retain the benefit of an agreement that was not honored. "'If plea bargaining is to fulfill its intended purpose, it must be conducted fairly on both sides and the

results must not disappoint the reasonable expectations of either.'" Schellert v. State, 569 S.W.2d 735, 739 (Mo.banc 1978)(citing State v. Thomas, 294 A.2d 57, 61 (1972)). Though a circuit court is never "bound" by a plea bargain between the prosecutor and defense attorney, if the court does not intend to honor the agreement, the parties should not be entrapped by any concessions they have made in reliance on the plea agreement. Id. at 738 (citing Ballard v. State, 207 S.E.2d 246, 249 (1974)). A decision by this Court prohibiting the State from proceeding on the original indictment would not only make a mockery of the plea negotiation process; it would create a forum in which improper ex parte contact between judges and defense attorneys would routinely divest the State of the power vested by the legislature through Section 195.295.2, RSMo.

Still further, charging decisions are in the province and power of the prosecution, not the court. The law does not allow a judge to reduce the charges against the defendant in a criminal case prior to trial. State ex rel. Dowd v. Nangle, 276 S.W.2d 135, 137-38 (Mo.banc 1955). By allowing the State to proceed on the plea agreement without informing the State that she was rejecting the plea agreement, Judge Baker succeeded in eliminating the sentence enhancement that was charged in the indictment. Judge Baker encroached on the charging power of the State.

If this court were to hold that Judge Baker required some specific grant of jurisdiction to correct her violation of Rule 24.02(d)(4), Rule 29.07(d) authorizes a sentencing court to set aside a judgment of conviction at any time "to correct manifest injustice." The record is clear that the State relied upon assurances that the Relator would not be sentenced pursuant to Section 217.362, RSMo, when it waived sentence enhancement. Anything short of setting the plea aside would result in a manifest injustice to the State of Missouri. See State v. Simpson, 836 S.W.2d 75, 79 (holding that a violation of Rule 24.02(d)(4) resulted in manifest injustice).

Relator argues that Judge Baker's original judgment and sentence did not constitute a manifest injustice because the state suffered no prejudice as a result of the court's actions. Relator's brief at 34-35. In State v. Simpson, 836 S.W.2d 75 (Mo.App., S.D. 1992), the court of appeals addressed this very issue. The appellant raised a claim that the trial court's failure to comply with Rule 24.02(d)(4) resulted in a manifest injustice. Id. at 79. The Southern District found that because "substantial rights" of the defendant were affected by the courts actions, a manifest injustice resulted. Id. at 79. In the case at bar, the State relied upon the sentencing concession of the court in waiving sentence enhancement. Had the State not waived enhancement, the Court would have been unable to sentence the defendant

as it did, and the result of the sentencing proceeding would have been entirely different. The result that the Relator suggests would, therefore, result in a manifest injustice to the State of Missouri.

The Relator further argues that no manifest injustice occurred as the result of the sentencing court's violation of Rule 24.02(d)(4) because the State allegedly had a right to seek resentencing under Section 547.200.2, RSMo. Relator's Brief at 34-45. The State's ability to seek an appeal from Judge Baker's original sentence is of no relevance when evaluating the prejudice incurred when reviewing for manifest injustice.

Relator also claims that Rule 29.07(d) applies only to situations where the defendant has moved to withdraw his plea. When interpreting a statute or court rule, the Court should first consider the words used in their plain and ordinary meaning. Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15, 19 (Mo.banc 1995). Further, the Court should attempt to give meaning to each and every word of the rule so as not to make any part of the language meaningless. State v. Hughes, 702 S.W.2d 864, 867 (Mo.App., W.D. 1986). Rule 29.07(d) states that "to correct a manifest injustice the court after sentence may set aside the judgment of conviction **and** permit the defendant to withdraw his plea." Rule 29.07(d), emphasis added. The use of a conjunctive in the rule indicates that there are two separate actions a court

may take to prevent a manifest injustice. If the language "set aside the judgment of conviction" were synonymous with "permit the defendant to withdraw his plea" the phrases would be duplicitous; thereby rendering one phrase meaningless. See Hughes at 867. As there is no language in Rule 29.07(d) mandating that a *defendant* must move to set aside the judgment of conviction in order for the court to do so, no such restriction on the court's jurisdiction should be inferred. As written, the rule allows the court to set aside the judgment of conviction to prevent a manifest injustice on the motion of a defendant, the motion of the State, and sua sponte.

As a matter of public policy, if this Court were to rule that the judgment cannot be set aside by Judge Baker, this ruling would put the State in a position where it could never make agreements to waive persistent drug offender enhancement in exchange for a guarantee that a defendant would be sentenced conventionally. In situations where immediate or slightly delayed probation and treatment are an unacceptable result for the State, as is the case when the facts of the case involve drug dealing as opposed to mere possession, the defendant is carrying a gun to further his criminal activities, and a defendant is charged with a class A or B felony Trafficking offense as a persistent drug offender, RAE at A14-A16, the State would be forced to exercise the full power granted by the legislature and eliminate a defendant's

ability to receive parole from his or her sentence. This result would inevitably lead to an overloading of the trial dockets and contribute further to overpopulation of Missouri prisons. By sustaining the State's right to enter into agreements of this sort, the Court would be reserving prison resources for the most serious offenders, while allowing the State to confront persistent drug offenders with a measure of effective force.

Judge Baker's original sentence is void because it violates Missouri law, specifically Rule 24.02(d)(4). Further, Rule 29.07(d) specifically grants jurisdiction to set aside a judgment after sentencing to prevent such a manifest injustice. In light of the State's reliance in waiving sentence enhancement and any reliance the Relator may have made on the State's waiver of sentence enhancement, the only fair result is to allow Judge Baker to set the plea aside and place the Relator and the State in the positions they occupied prior to the plea. Relator's point I must fail.

II.

ALLOWING THE 22ND JUDICIAL CIRCUIT TO TRY RELATOR FOR HIS CRIMES WOULD NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE BECAUSE THERE IS NO FINAL JUDGMENT ON THE CHARGES FOR THE REASONS ARGUED IN RESPONDENT'S RESPONSE TO POINT I.

Relator claims that if the 22nd Judicial Circuit is allowed to proceed with the trial of this cause his right to be protected from double jeopardy for his crimes will be offended.

"The double jeopardy clause protects persons from being subjected to the same offenses after acquittal; second prosecution for the same offense after conviction; and multiple punishments for the same offense." Wright v. State, 764 S.W.2d 96, 97 (Mo.App., W.D. 1988)(citation omitted). If this Court finds that Judge Baker had jurisdiction to set aside her sentence, the sentence was a nullity; thus no final judgment has been entered, Ossana v. State, 699 S.W.2d 72, 73 (Mo.App., E.D. 1985), and his constitutional right against double jeopardy does not apply. Relator's point II must fail.

CONCLUSION

Judge Baker maintained jurisdiction to set aside her previously entered sentence because it was contrary to Missouri law and thus void. Relator's constitutional right to be protected from double jeopardy is not offended because, as a result of Judge Baker's order, there is no final judgment against the Relator.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wade Thomas, certify that I have mailed, via interoffice mail, a copy of this Respondent's Statement, Brief, and Argument on this 7th day of September 2001, to:

Michael Meyers
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Wade Thomas

IN THE SUPREME COURT
STATE OF MISSOURI

Dean Williams, Relator, v. Honorable Timothy Wilson, sitting in the Circuit Court of the City of St. Louis by Order of the Supreme Court, Respondent.	)	Cause No. SC83617

CERTIFICATE OF COMPLIANCE WITH SUPREME COURT SPECIAL RULE 1(b)

COMES NOW Wade Thomas, Attorney for Respondent, and pursuant to Missouri Supreme Court Rule 84.06, Special Rule No. 1.c. states the following:

1. The foregoing brief complies with the limitations contained in Special Rule 1(b).
2. The brief contains 5,235 words.
3. Respondent's counsel calculated the words in the brief by using the word count function of the word processing system used to prepare the brief.

WHEREFORE, Respondent's counsel respectfully submits that the foregoing brief complies with Special Rule No. 1(b).

Respectfully submitted,

_____

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(314) 622-4867

CERTIFICATE OF SERVICE

I, Wade Thomas, certify that I have mailed, via interoffice mail, a copy of this certificate of compliance on this 7th day of September 2001, to:

Michael Meyers
Assistant Public Defender
1320 Market St., Room 62
St. Louis, MO 63103

_____

Wade Thomas

IN THE SUPREME COURT
STATE OF MISSOURI

Dean Williams,	)	
	)	
Relator,	)	
	)	
v.	)	Cause No. SC83617
	)	
Honorable Timothy Wilson, sitting in the Circuit Court of the City of St. Louis by Order of the Supreme Court,	)	
	)	
Respondent.	)	

CERTIFICATE OF VIRUS-FREE DISKS

COMES NOW Wade Thomas, Assistant Circuit Attorney for the City of St. Louis, Missouri, and certifies that he has scanned both floppy disks served to this Court using the McAfee virus scanning program and both disks were found to be virus free.

Respectfully submitted,

_____

Wade Thomas
Assistant Circuit Attorney
1320 Market Street, Rm 330
St. Louis, MO 63103
(314) 622-4867

CERTIFICATE OF SERVICE

I, Wade Thomas, certify that I have mailed, via interoffice mail, a copy of this certificate of virus-free disks on this 7th day of September 2001, to:

Michael Meyers
Assistant Public Defender
1320 Market St., Room 62
St. Louis, MO 63103

_____
Wade Thomas

APPENDIX OF EXHIBITS